In the Supreme Court of the United States

Office Supreme Court, U. S.
FILED
JUN 16 1942
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1941

No. 153

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, as Owner of the Steamship "EDWARD LUCKENBACH",
Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, a corporation, NAVIGAZIONE LIBERA TRIESTINA, S.A., a corporation, SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, a corporation, (Owners and Underwriters of the Motorship "FELTRE"),

HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

LYMAN HENRY,
Merchants Exchange Building,
San Francisco, California,
Counsel for Petitioner.

FREDERICK W. DORR,
Merchants Exchange Building,
San Francisco, California,
Of Counsel.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Page

I. Opinions of the Circuit Court of Appeals 2

II. Jurisdictional Statement 2

III. Statement of the Case 2

IV. Assignment of Errors 3

V. Argument 4

Summary of Argument 4

1. The majority opinion of the Circuit Court of Appeals shows that the court was clearly in error in affirming the decree of fault against petitioner's vessel 7

2. The majority opinion shows that the pilot of the "Edward Luckenbach" was an experienced Columbia River pilot 8

3. The majority opinion confirms the findings of the Commissioner and the District Court that the collision occurred on the "Edward Luckenbach's" side of the channel 10

4. The opinion of the majority of the court shows that they considered the case on the erroneous assumption that the evidence against both vessels was in sharp conflict 12

5. The majority opinion confirmed the finding that the collision occurred in a narrow channel 15

6. The majority of the court failed to review the whole body of the evidence in order to arrive at an independent judgment, as required on a trial *de novo* 16

7. The testimony regarding the position of the "Edward Luckenbach" in the channel at the bend of the river, at the time the vessels sighted each other, was conflicting, according to the majority opinion, and, in any event, the location of the "Edward

Page

Luckenbach'' at that time was immaterial and had no bearing on the collision 16

8. The majority opinion shows that the ''Feltre's'' lack of a lookout was the proximate cause of the collision 18

9. The majority opinion shows that the ''Feltre'' instead of stopping, reversing, and sounding the danger signal, continued on her course and turned to the left, in violation of the Inland Rules, without the consent of the ''Edward Luckenbach'' 20

10. Although the location of the collision on the ''Edward Luckenbach's'' side of the channel was established by the undisputed findings of the Commissioner and the District Court, the majority opinion, without support in the record, states erroneously that the location was unclear 21

11. The majority opinion shows that there was no clear and convincing evidence to establish the alleged violation by the ''Edward Luckenbach'' of the ''narrow channel'' rule as required by the decisions of this court 25

12. The testimony of the ''down-river'' witnesses regarding the alleged position of the ''Edward Luckbach'' in the bend of the river, below the location of the collision, was immaterial, as that testimony had no relation to the collision 26

13. The majority of the court stated that the Conway chart (Conway Ex. 1, R. 1335), which was shown by the dissenting opinion to be utterly worthless, was not appraised by the court and was given little consideration in evaluating the testimony; but the majority opinion shows, nevertheless, that the Conway chart was used to locate the ''Edward Luckenbach'' on the wrong side of the channel 28

14. The intimation in the majority opinion that the ''Edward Luckenbach'' pilot's method of navigation was negligent is refuted by the record and by the recognized authority 30

Page

15. The majority opinion shows clearly that the court rejected the "Feltre" pilot's version of the collision, and shows further that the evidence against the "Edward Luckenbach" was doubtful 31

16. The failure of the majority of the court to appraise the value of the Conway chart confirms the conclusion in the dissenting opinion that the Conway chart should be entirely disregarded and that it was utterly worthless 33

17. The majority and minority opinions agree that the "Feltre" testimony against the "Edward Luckenbach" should be rejected 35

VI. AUTHORITIES 36

VII. CONCLUSION 42

APPENDIX—Dissenting opinion of Judge Wilbur i

Table of Authorities Cited

Pages

CASES

City of New York, The, 147 U. S. 72, 85 ..... 36, 37, 41

Eagle, The, (C.C.A. 9) 289 F. 661, 663 36

Ernest H. Meyer, The, (C.C.A. 9) 84 F. 2d 496, 500 39

Haven Belle, The, (C.C.A. 4) 85 F. 2d 939, 941 36

La Flandre, (C.C.A. 3) 9 F. 2d 331, 333 36

Langnes v. Green, 282 U.S. 531, 536, 537 ..... 38, 39

Luckenbach S.S. Co., Inc. v. Societa Anonima P.I.C., et al. (C.C.A. 9) 127 F. 2d 86-100 2

Ludvig Holberg, The, 157 U.S. 60, 71 36

Marshall Field & Co. v. United States, (C.C.A. 2) 48 F. 2d 763, 766 36

Munson S.S. Line v. Miramar S.S. Co., (C.C.A. 2) 167 F. 960 39

Oregon, The, 158 U.S. 186, 197 36

Otto Marmet Coal & Mining Co. v. Fieger-Austin Dredging Co., (C.C.A. 6) 259 F. 435, 442 36

Reid v. American Express Co., 241 U.S. 544, 548 39

Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146, 155 39

Umbria, The, 166 U.S. 404, 409 36

Victory & The Plymothian, The, 168 U.S. 410, 423 ..... 36, 37

Watts, Watts & Company, Limited v. Unione Austriaca, 248 U.S. 9, 21 38

Yamashita Kisen Kabushiki Kaisha v. McCormick Intercoastal S.S. Co., (C.C.A. 9) 20 F. 2d 25, 27 36

TEXT-BOOK

Bowditch's *American Practical Navigator*, (1917 Ed.) p. 69 30

In the Supreme Court of the United States

OCTOBER TERM, 1941

No.

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, as Owner of the Steamship "EDWARD LUCKENBACH",
Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, a corporation, NAVIGAZIONE LIBERA TRIESTINA, S.A., a corporation, SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, a corporation, (Owners and Underwriters of the Motorship "FELTRE"),

HAWAII LIQUOR COMPANY, LIMITED, et al., (Cargo Claimants),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

I. OPINIONS OF THE CIRCUIT COURT OF APPEALS.

The majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit will be found in the record at pages 1416-27, and the dissenting opinion at pages 1427-60, inc. The opinions will also be found in 127 F. 2d, 86-100, inc. No opinion was rendered by the District Court.

The majority opinion of the Circuit Court of Appeals is reviewed at length in this brief, and the dissenting opinion is set forth in the Appendix.

II. JURISDICTIONAL STATEMENT.

In Section B of the accompanying petition is set forth a jurisdictional statement in compliance with Rule 38, par. 2, and Rule 12, par. 1, of this court. The statement refers to the statutory provisions that sustain the jurisdiction of this court, and shows the date of the decree of the Circuit Court of Appeals, the date of the denial of a petition for rehearing, the nature of the case, and the rulings of this court that bring the case within the jurisdictional provisions relied upon.

In the interest of brevity, petitioner refers to said jurisdictional statement and incorporates the same herein by such reference, without repeating the statement at length herein.

III. STATEMENT OF THE CASE.

A statement of that portion of the case that is material to the consideration of petitioner's application for a writ of certiorari is set forth in Section A of the accompany-

ing petition, to which statement, for the sake of brevity, reference is hereby made.

The general facts with respect to the collision are set forth in the majority opinion of the Circuit Court of Appeals which is analyzed in Section V of this brief, entitled "Argument". Any additional facts that may be deemed necessary to a consideration of the petition will be called to the attention of the court in connection with the analysis of the opinion.

IV. ASSIGNMENT OF ERRORS.

1. In view of the facts that: (a) the clear fault of the "Feltre" was established by uncontradicted testimony and found by the District Court and affirmed by the Circuit Court of Appeals, which fault was of itself sufficient to account for the collision with petitioner's vessel, the "Edward Luckenbach", that occurred in the Columbia River on February 17, 1937; (b) on the single issue considered by the court, viz.: the alleged violation of the "narrow channel" rule, the evidence against petitioner's vessel, according to the express statement of the majority of the court, was in "sharp conflict", only "fairly clear", merely "persuasive", and "may be doubted"; and (c) the Circuit Court of Appeals made no finding of fault against petitioner's vessel based on clear and convincing evidence; the Circuit Court of Appeals erred in affirming the decision of fault against petitioner's vessel with respect to the collision.

2. The Circuit Court of Appeals erred in not finding and holding, for the reasons set forth in the preceding

assignment, that the interlocutory decree of the District Court should be modified and the "Feltre" held solely to blame for the collision.

3. The majority of the Circuit Court of Appeals erred in failing and refusing to consider the whole body of the evidence as required on a trial *de novo* in admiralty in order to reach an independent judgment in the case; and in confining its consideration to a single issue, and in finding against petitioner's vessel on that issue on evidence that the court stated was in "sharp conflict", only "fairly clear", merely "persuasive", and "may be doubted".

4. The majority of the Circuit Court of Appeals erred in rendering a decision against petitioner's vessel, the "Edward Luckenbach", in direct conflict with the settled law as established by the decisions of this court.

V. ARGUMENT.

SUMMARY OF ARGUMENT.

1. The majority opinion of the Circuit Court of Appeals shows that the court was clearly in error in affirming the decree of fault against petitioner's vessel.
2. The majority opinion shows that the pilot of the "Edward Luckenbach" was an experienced Columbia River pilot.
3. The majority opinion confirms the findings of the Commissioner and the District Court that the collision occurred on the "Edward Luckenbach's" side of the channel.

4. The opinion of the majority of the court shows that they considered the case on the erroneous assumption that the evidence against both vessels was in sharp conflict.

5. The majority opinion confirmed the finding that the collision occurred in a narrow channel.

6. The majority of the court failed to review the whole body of the evidence in order to arrive at an independent judgment, as required on a trial *de novo*.

7. The testimony regarding the position of the "Edward Luckenbach" in the channel at the bend of the river, at the time the vessels sighted each other, was conflicting, according to the majority opinion, and, in any event, the location of the "Edward Luckenbach" at that time was immaterial and had no bearing on the collision.

8. The majority opinion shows that the "Feltre's" lack of a lookout was the proximate cause of the collision.

9. The majority opinion shows that the "Feltre", instead of stopping, reversing, and sounding the danger signal, continued on her course and turned to the left, in violation of the Inland Rules, without the consent of the "Edward Luckenbach".

10. Although the location of the collision on the "Edward Luckenbach's" side of the channel was established by the undisputed findings of the Commissioner and the District Court, the majority opinion, without support in the record, states erroneously that the location was unclear.

11. The majority opinion shows that there was no clear and convincing evidence to establish the alleged violation by the "Edward Luckenbach" of the "'narrow channel" rule as required by the decisions of this court.

12. The testimony of the "down-river" witnesses regarding the alleged position of the "Edward Luckenbach" in the bend of the river, below the location of the collision, was immaterial, as that testimony had no relation to the collision.

13. The majority of the court stated that the Conway chart (Conway Ex. 1, R. 1335), which was shown by the dissenting opinion to be utterly worthless, was not appraised by the court and was given little consideration in evaluating the testimony; but the majority opinion shows, nevertheless, that the Conway chart was used to locate the "Edward Luckenbach" on the wrong side of the channel.

14. The intimation in the majority opinion that the "Edward Luckenbach" pilot's method of navigation was negligent is refuted by the record and by the recognized authority.

15. The majority opinion shows clearly that the court rejected the "Feltre" pilot's version of the collision, and shows further that the evidence against the "Edward Luckenbach" was doubtful.

16. The failure of the majority of the court to appraise the value of the Conway chart confirms the conclusion in the dissenting opinion that the Conway chart should be entirely disregarded and that it was utterly worthless.

17. The majority and minority opinions agree that the "Feltre" testimony against the "Edward Luckenbach" should be rejected.

1. **THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS SHOWS THAT THE COURT WAS CLEARLY IN ERROR IN AFFIRMING THE DECREE OF FAULT AGAINST PETITIONER'S VESSEL.**

The decree of the Circuit Court of Appeals was entered "in accordance with the majority opinion" (R. 1416). It is necessary, therefore, to analyze the majority opinion in order to ascertain the basis for the decision against the "Edward Luckenbach".

Petitioner's petition for a writ of certiorari is based upon grounds that are apparent on the face of the majority opinion. In order to emphasize to this court the reasons why the writ should be granted, the majority opinion is inserted herein with petitioner's comments relative to the points that are essential to a consideration of the petition.

The majority opinion is as follows:

"OPINION

Before: Wilbur, Haney and Healy, Circuit Judges.

HEALY, Circuit Judge.

"On February 17, 1937 the American steamer Edward Luckenbach and the Italian motorship Feltre collided in the Columbia river at a point about four miles above Longview, Washington. As a result of the collision the Feltre sank to her main deck in the channel. She was thereafter libeled by cargo owners and sold under process.

"Subsequent to the collision the owner and operator of the Feltre filed a libel in the court below against the Edward Luckenbach and her owner requesting damages sustained in the loss of the ship and her cargo. The owner of the Luckenbach thereupon petitioned for exoneration from or limitation of liability. There were claims and answers in the limitation proceeding on the part of the Feltre and cargo claimants. A special master was appointed by the court to hear and report on all issues of fact and law involved. The master, determining that the owner of the Luckenbach was entitled to limit its liability, found that both vessels were at fault. Exceptions were taken to the findings of the master, but these were approved by the court and all parties save the cargo claimants have appealed. The sole question presented is the responsibility for the collision.

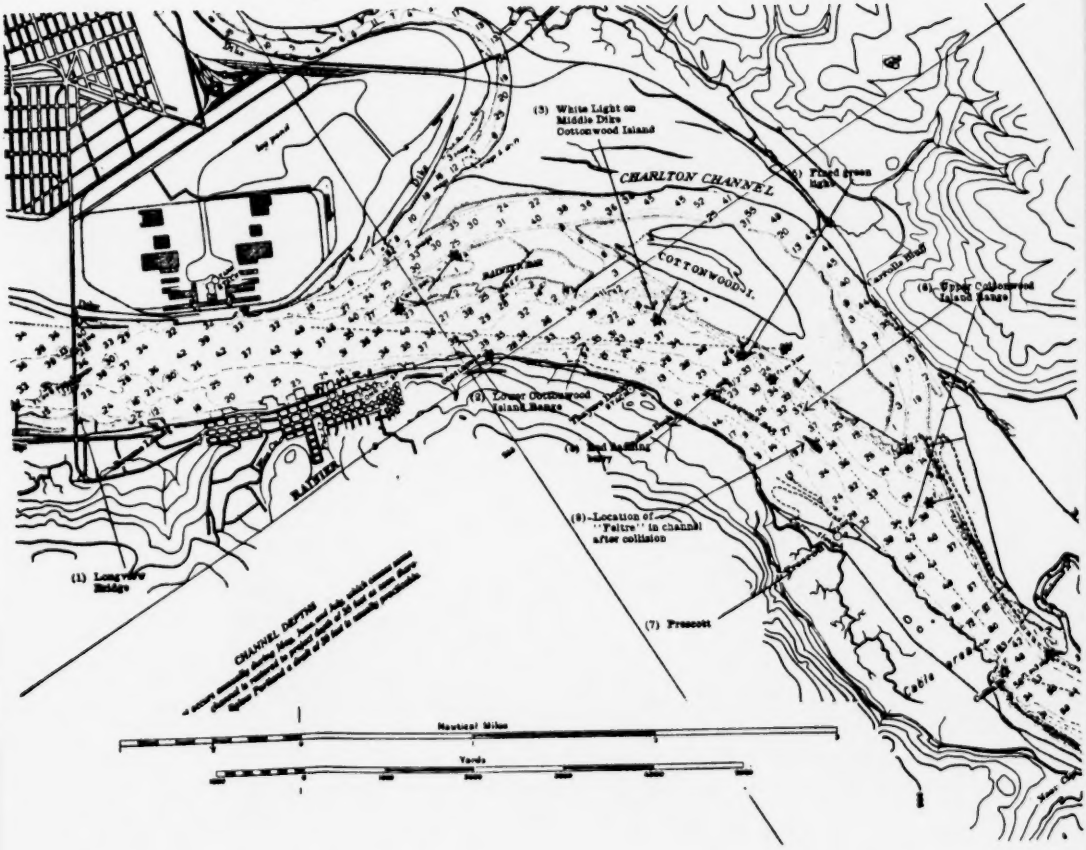
"The Edward Luckenbach is a steam turbine vessel 457 feet long and with a beam of 57 feet. At the time of the collision her forward draft was 14 feet 6 inches and her aft draft 18 feet 6 inches." (R. 1416-17)

2. THE MAJORITY OPINION SHOWS THAT THE PILOT OF THE "EDWARD LUCKENBACH" WAS AN EXPERIENCED COLUMBIA RIVER PILOT.

The opinion states:

"She was proceeding, partly loaded, up the Columbia toward Portland in charge of Captain McNelly, an *experienced, licensed* Columbia river pilot." (R. 1417) (Emphasis in quotations supplied.)

This fact was found by the Commissioner (R. 213) and was not excepted to (R. 278-88), nor was any error assigned with respect to said finding (R. 342-54). The


(3) White Light on Middle Dike Cottonwood Island
CHARLTON CHANNEL
(4) Fixed green light
COTTONWOOD I.
(5) Upper Cottonwood Island Range
(2) Lower Cottonwood Island Range
(8) Location of "Feltre" in channel after collision
(1) Longview Bridge
(7) Prescott
CHANNEL DEPTHS
Nautical Miles
Yards

statement in the majority opinion that the pilot of the "Edward Luckenbach" was an *experienced, licensed Columbia river pilot,* is significant in view of the later suggestion (R. 1425-6), without any basis in the record as we will show, that the pilot may have been negligent.

The majority opinion continues as follows:

> "The Feltre, a vessel about 460 feet in length with a beam of 55 feet, was powered by means of a Burmeister diesel engine. She carried a cargo of 3500 tons. She was proceeding down the river from Portland in charge of Captain Turppa, an experienced, licensed Columbia river pilot.
>
> "A copy of the government chart of the vicinity is incorporated as an aid to a proper understanding of the discussion which follows. We will refer to the points indicated on the chart without further explanation. As the chart appears here the meridian line is at an angle of about 45° with the vertical.
>
> "The findings are in substance these: The collision occurred between 1:40 and 1:41 A.M. Prior to and at the time of the impact the wind was estimated to be blowing from 25 to 60 miles per hour from a south south-easterly direction, or approximately down the Upper Cottonwood Island Range, striking the Feltre astern and the Luckenbach on her starboard bow as the vessels approached each other. Visibility was good, although it was raining, and was estimated by witnesses to be from 3 to 6 miles. The tide was ebb and was running against the Luckenbach; and the set of the tide and current was toward the Washington side of the river. The current was running at a speed of about 2 knots per hour. The vessels sighted each other when the Luckenbach was below the red

flashing buoy on Dobelbower Bar and the Feltre was about Prescott.

"The Columbia river in the general vicinity is a narrow channel within the meaning of Art. 25 of the Inland Rules and said article was applicable to the navigation of both vessels in approaching and passing each other.

"Both vessels had been proceeding with engines at full speed ahead for some time prior to the collision and both vessels continued at that speed until the impact. The speed of the Luckenbach was about 7.77 knots and that of the Feltre was about 12 knots, over the ground. The vessels collided at a *sharp angle,* the stem of the Luckenbach striking the Feltre on her starboard side at No. 2 hatch and ripping off a considerable section of the Feltre's plating, as a result of which the Feltre sank." (R. 1417-20)

3. THE MAJORITY OPINION CONFIRMS THE FINDINGS OF THE COMMISSIONER AND THE DISTRICT COURT THAT THE COLLISION OCCURRED ON THE "EDWARD LUCKENBACH'S" SIDE OF THE CHANNEL.

The opinion states:

"The collision occurred at a point between the upper end of Cottonwood Island and the lower end of Prescott dock, and, with respect to the channel, occurred between the Upper Cottonwood Island Range and a point 300 feet to the *right* thereof, proceeding *upstream.*" (R. 1420)

This statement by the majority of the court regarding the location of the collision to the *right* of the Upper Cottonwood Island Range proceeding *upstream* agrees with the findings of the Commissioner (R. 244-5) and the Dis-

trict Court (R. 293), and fixes the location of the collision on the *"Edward Luckenbach's" proper side of the channel.* The location of the "Feltre" in the channel after the collision is shown on the chart inserted in the majority opinion (R. 1418) and also inserted herein.

In the dissenting opinion, Judge Wilbur stated "the point of collision is virtually decisive of the case" (R. 1435).

The majority opinion continues as follows:

> "The collision and the resulting damage to both vessels and to the cargo carried on the Feltre was found to be due to and caused by the negligent navigation and faults of both vessels in the particulars now to be stated.
>
> "The navigational faults of the Luckenbach contributing to and causing the collision were, (1) she violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range; (2) she failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions; (3) she proceeded at an immoderate rate of speed for the conditions prevailing; (4) she failed, in a channel of ample width to enable vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre; and, (5) she failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing.
>
> "As for the Feltre, the findings are that she was guilty of negligent navigation contributing to and causing the collision in that, (1) she did not have a proper lookout, no lookout being stationed in the bow

of the ship and no member of the watch being stationed elsewhere for the sole purpose of acting as lookout; (2) she failed to sound the danger signal and failed to stop and reverse as required by the attendant conditions; (3) she sounded a two-blast signal and altered her course to her own left before the Luckenbach assented; (4) she violated the narrow channel rule by swinging to her own left across the Upper Cottonwood Island Range; (5) she proceeded at an immoderate rate of speed for the conditions prevailing; (6) she failed, in a channel of ample width, to allow the Luckenbach a safe margin for passing; and (7) she failed to take any compass bearing of the Luckenbach as the two vessels approached each other, a precaution which would have permitted her to observe a safer margin in passing." (R. 1420-21)

The foregoing is a recital of the findings against the vessels by the District Court. The majority of the Circuit Court of Appeals, in considering the navigation of the "Edward Luckenbach", as we will show, confined its discussion to a single point, namely, the alleged violation of the "narrow channel" rule.

4. THE OPINION OF THE MAJORITY OF THE COURT SHOWS THAT THEY CONSIDERED THE CASE ON THE ERRONEOUS ASSUMPTION THAT THE EVIDENCE AGAINST BOTH VESSELS WAS IN SHARP CONFLICT.

The opinion states:

> "We see no sufficient reason for disturbing these findings. While the evidence is in *sharp conflict* the weight of it appears to us to require an affirmance." (R. 1421)

This statement of the majority of the court with reference to the findings of fault against *both vessels* was clearly erroneous and demonstrates that the appellate court failed to review the whole body of the evidence as required on a trial *de novo* in admiralty. The record shows clearly that there was no "sharp conflict" in the evidence that established fault on the part of the "*Feltre*", but, on the contrary, the faults of the "Feltre" were established by the uncontradicted testimony of her own witnesses. The Commissioner's report quotes the "Feltre" testimony that established that the vessel had no lookout (R. 216), that she failed to stop and reverse and to sound the danger signal (R. 220-2), that she sounded a two-blast signal and changed her course to the left without the consent of the "Edward Luckenbach" (R. 224-6), and that she proceeded at an immoderate speed although her pilot admitted that she "had no backing power worth anything, practically" and that she was a "miserable vessel to handle" (R. 227).

The majority of the court, in finding that the evidence was "in sharp conflict", and in ignoring the fact that there was *no conflict in the testimony regarding the faults of the "Feltre"*, failed to consider the navigation of the "Edward Luckenbach" in the light of the presumption in favor of that vessel which resulted from the clear finding of fault against the "Feltre", established by uncontradicted testimony and sufficient to account for the collision.

In marked contrast, the dissenting opinion of Judge Wilbur stated (R. 1439-40):

> "It is enough to say that the evidence indicates a clear fault on the part of the Feltre in leaving her

side of the channel with no clear, convincing proof that the Luckenbach was in the wrong;[3] on the contrary, the circumstantial evidence and the quoted testimony given by pilot and wheelsman of the Feltre corroborates the testimony of the Luckenbach that she was at all times on her own side of the channel and that the collision resulted from the action of the Feltre in leaving her side of the channel".

"[3]'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' The City of New York, 147 U.S. 72, 85.

'As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.' The Victory and The Plymothian, 168 U.S. 410, 423."

The record shows, furthermore, that, with respect to the "Edward Luckenbach", the only issue on which there was any *conflict* in the testimony was in regard to the alleged violation of the "narrow channel" rule, (quoted in majority opinion) and that as to the other alleged faults there was no evidence whatsoever. The exceptions filed by petitioner to the report of the Commissioner (R. 255-60) point out the entire lack of any evidence that

had any tendency to sustain the findings of alleged fault against the "Edward Luckenbach" on all issues except the alleged violation of the "narrow channel" rule, and as to that issue, the exceptions (R. 251-55) point out the error in finding against that vessel.

Petitioner assigned as error on appeal each of the foregoing findings against the "Edward Luckenbach" (R. 304-13).

The majority of the court were therefore clearly in error in deciding the case on the assumption that there was a "sharp conflict" in the evidence with respect to both vessels, which assumption deprived the "Edward Luckenbach" of the benefit of the presumption resulting from the clear fault of the "Feltre" established by uncontradicted testimony.

5. THE MAJORITY OPINION CONFIRMED THE FINDING THAT THE COLLISION OCCURRED IN A NARROW CHANNEL.

The opinion states:

> "We agree that the narrow channel rule is applicable.[1]

---

[1] "Art. 25. 'In narrow channels every steam vessel shall, when it is safe and practicable, keep on that side of the fairway or mid-channel which lies on the starboard side of such vessel.' 33 U.S.C.A. §210." (R. 1421)

The finding that the collision occurred in a narrow channel, within the meaning of the Inland Rules, es-

tablishes the clear fault of the "Feltre" in crossing to the wrong side of the channel.

6. THE MAJORITY OF THE COURT FAILED TO REVIEW THE WHOLE BODY OF THE EVIDENCE IN ORDER TO ARRIVE AT AN INDEPENDENT JUDGMENT, AS REQUIRED ON A TRIAL *DE NOVO*.

The opinion states:

> "Whether each vessel was guilty of all of the faults attributed to it *we need not inquire*, since it is *clear* that each was guilty of *one or more serious navigational* faults contributing to the collision." (R. 1421)

The majority opinion fails to show, however, as we will point out, that the "Edward Luckenbach" was guilty of "one or more serious navigational faults".

7. THE TESTIMONY REGARDING THE POSITION OF THE "EDWARD LUCKENBACH" IN THE CHANNEL AT THE BEND OF THE RIVER, AT THE TIME THE VESSELS SIGHTED EACH OTHER, WAS CONFLICTING, ACCORDING TO THE MAJORITY OPINION, AND, IN ANY EVENT, THE LOCATION OF THE "EDWARD LUCKENBACH" AT THAT TIME WAS IMMATERIAL AND HAD NO BEARING ON THE COLLISION.

The majority opinion states:

> "When the vessels sighted each other they were well over a mile, perhaps a mile and a half, apart. In the vicinity of the collision that portion of the channel having a depth of 19 feet or more was over 2000 feet wide, and the width of the deep water channel—30 feet or more in depth—was in the neighborhood of 1000 feet. While those on board her deny

> it, the Luckenbach, when first sighted by the Feltre, was on the Washington side of the channel and continued on that side at least for several minutes thereafter." (R. 1421-22)

At the time when the two vessels sighted each other, they were, according to the court's statement (R. 1421), "well over a mile, perhaps a mile and a half apart", and their respective positions were immaterial. Judge Wilbur said in the dissenting opinion:

> "The course traversed by the Luckenbach up to the time the two vessels sighted one another when one and one-half miles distant is entirely immaterial." (R. 1443)

In the majority opinion, the court does not refer to any evidence in support of the statement that the "Edward Luckenbach" "continued on that side at least for several minutes thereafter" (R. 1422). Furthermore we will show hereinafter that the majority of the court expressly rejected the testimony of the "Feltre" witnesses and the Conway chart (Conway Ex. 1., R. 1335), which was the only evidence that would lend support to the foregoing statement in the majority opinion.

In the dissenting opinion, however, the evidence that related to the position of the "Edward Luckenbach" in the channel, was reviewed at length, and Judge Wilbur stated (R. 1440):

> "* * * the circumstantial evidence and the quoted testimony given by pilot and wheelsman of the Feltre corroborates the testimony of the Luckenbach that she was at all times *on her own side of the*

channel and that the collision resulted from the action of the Feltre in leaving her side of the channel."

8. THE MAJORITY OPINION SHOWS THAT THE "FELTRE'S" LACK OF A LOOKOUT WAS THE PROXIMATE CAUSE OF THE COLLISION.

The majority opinion states:

> "On her part, the Feltre had *no lookout* in the bow of the vessel, and the lookout on the bridge had other duties to perform. The Feltre saw the range lights and the starboard colored light of the Luckenbach on her port bow and in a short time blew one whistle to indicate a port-to-port passing. This was answered by an assenting blast from the Luckenbach, *but the answering whistle was not heard on the Feltre. Had a proper lookout been maintained it is entirely possible that the answering signal would have been heard,* and the confusion thereafter arising in the mind of Pilot Turppa as to the purpose of the Luckenbach would have been to an extent obviated." (R. 1422)

This statement in the majority opinion shows the clear fault of the "Feltre" in not maintaining a lookout, and shows, furthermore, that the lack of a lookout caused the collision. It shows also that the "Edward Luckenbach" complied with the Rules of the Road by answering the "Feltre's" one-blast signal.

The entire case against the "Edward Luckenbach" depended on her navigation *after the two vessels exchanged the one-blast passing signals* at a distance of a mile to a mile and one-half apart.

The "Feltre" pilot claimed that the "Edward Luckenbach" thereafter held a steady course and crossed the Upper Cottonwood Island Range and the course of the "Feltre", thereby causing that vessel to execute a left-hand maneuver one-half minute before the collision. This version of the "Feltre's" pilot was "doubted" by the majority of the Circuit Court of Appeals (R. 1426), and was refuted by the review of the evidence in the dissenting opinion (R. 1435-38).

The "Luckenbach" testimony established that upon the exchange of one-blast signals the vessel's course was changed to the *right,* and this change was confirmed by the record of her gyro compass which recorded automatically the vessel's headings by compass. In the majority opinion the compass record was referred to as follows:

> "At 1:38 A. M. her compass course changed to 176° and at 1:39 it was 188.5°. At 1:40, almost at the moment of the collision, her course was 180.5°." (R. 1425)

The change to 176° from the previous course of 155.5° (R. 1425) involved a change of 20.5° to the *right,* and the further swing to 188.5° involved a change of 12.5° to the right, and establishes that the "Edward Luckenbach" changed her course to the *right* a total of 33°, commencing at 1:38 A. M., *three minutes before the collision.*

This positive physical evidence corroborated the "Luckenbach" testimony and was opposed only by the "Feltre" testimony which the Circuit Court of Appeals "doubted" and which the dissenting opinion (R. 1452) stated was

"so at variance with established facts as to be altogether unreliable".

9. THE MAJORITY OPINION SHOWS THAT THE "FELTRE", INSTEAD OF STOPPING, REVERSING, AND SOUNDING THE DANGER SIGNAL, CONTINUED ON HER COURSE AND TURNED TO THE LEFT, IN VIOLATION OF THE INLAND RULES, WITHOUT THE CONSENT OF THE "EDWARD LUCKENBACH".

The majority opinion states:

> "As the vessels neared each other, *according to Pilot Turppa* and others aboard the Feltre, the Luckenbach crossed the Upper Cottonwood Range and blotted out the range lights. At that time the Feltre sounded a *two-blast whistle,* and simultaneously her course was directed to the *left.* Shortly after the two-blast whistle the vessels collided at a sharp angle. Neither vessel stopped her engines until almost the instant of collision." (R. 1422)

The foregoing reference to Pilot Turppa's version that the "Edward Luckenbach" crossed the upper range, will be considered hereafter in connection with the comment by the majority of the court that it "may be doubted" whether Turppa's version was correct.

The majority opinion continues:

> "Prior to sounding the two-blast whistle and making the left swing, the Feltre had been guided, not by means of a compass, but by two shore lights marking the Upper Cottonwood Island Range. This is a proper course to be used by vessels going downstream, and it is not disputed that the Feltre *continued on that course* until the two-blast whistle was

sounded.[2] In the neighborhood of the collision this range is well to the right of mid-channel on the Washington side of the river.

* * * * * * *

[2]"All witnesses who mention the subject seem to agree on this. For example, Captain Murphy of the Luckenbach testified that he was watching the Feltre prior to the two-blast signal, that she appeared to be coming right down her range as she had been going; that he observed her masthead light, range light, and red side light on her port bow; that when she blew the two-blast signal he observed that 'her red light started to swing to her left, . . . then both side lights came into view, the masthead light and range lined up, and the red light went out of sight and the green light came in full view'." (R. 1422-23)

An examination of the chart that is inserted in the majority opinion (R. 1418) and also in this brief, will show that the Upper Cottonwood Island Range opposite the location of the "Feltre" in the channel, is approximately in the *center* of the deep water channel and not "well to the right of mid-channel", as stated in the majority opinion. The chart shows, furthermore, that the location of the "Feltre" is near the edge of the channel and *well to the right* of the range looking *upstream* toward the right-hand side of the chart.

10. **ALTHOUGH THE LOCATION OF THE COLLISION ON THE "EDWARD LUCKENBACH'S" SIDE OF THE CHANNEL WAS ESTABLISHED BY THE UNDISPUTED FINDINGS OF THE COMMISSIONER AND THE DISTRICT COURT, THE MAJORITY OPINION, WITHOUT SUPPORT IN THE RECORD, STATES ERRONEOUSLY THAT THE LOCATION WAS UNCLEAR.**

The majority opinion states:

"While the master was of opinion that, as a result of her left swing, the Feltre actually passed over

> from her right side of the channel and into the Luckenbach's side of the river, the precise point of the collision is *unclear*. Divers found the Feltre's strong backs from No. 3 hatch on the bottom of the river about 15 feet from the starboard side of the Feltre and 55 feet upstream, and anchor flukes of the Luckenbach which were broken off by a boat davit on the Feltre were also found in the same relative position." (R. 1423)

The Commissioner and the District Court made definite findings regarding the location of the collision on the "Edward Luckenbach's" side of the channel, and the majority of the court referred to those findings earlier in the majority opinion (R. 1420). Although those findings with respect to the location of the collision were not excepted to (R. 278-88) nor assigned as error on appeal (R. 342-54), the majority of the court now states that the precise point of collision is "unclear".

In the dissenting opinion, Judge Wilbur reviewed the evidence and concluded that the place of collision was established by the wreckage on the bottom of the river (R. 1434).

The majority opinion continues as follows:

> "From these physical facts the Luckenbach insists that the Feltre sank practically in the same spot as that at which the collision occurred. However, *the master and the trial court accepted the testimony of Pilot Turppa* that the Feltre did not sink immediately, but came to rest on the bottom in about her own length, or about 450 or 500 feet. There are good reasons for believing that the estimate approximates the truth. A watchman and an oiler, who

> were in the engine room of the Feltre at the time of the collision, *had ample time in which to go from the engine room to the deck* after the crash occurred. It may well be that the wreckage did not drop into the water until the vessels became separated." (R. 1423-24)

In the foregoing excerpt from the majority opinion, there are three statements that are refuted by the record, as follows:

(a) In neither the findings of the District Court (R. 289-95), nor in the Commissioner's report (R. 237-8), is there any reference to the adoption of Captain Turppa's testimony regarding the movement of the "Feltre" as stated in the majority opinion (R. 1424).

In regard to the actual location of the collision, the Commissioner referred to the physical evidence, namely, the finding of the strongbacks and anchor flukes on the river bottom, and he also mentioned the testimony of Captain Turppa, referred to in the majority opinion, that the "Feltre" sank in about her own length (R. 237). The Commissioner then stated (R. 238):

> "* * * it is the feeling of your Special Master that the Feltre, after blowing the two-blast signal and directing its course to her own left actually *crossed over the center of the channel,* even though the swinging to the left would not commence immediately upon the hard left rudder."

The Commissioner said also (R. 226-7):

> "Suffice it to say, at this time, that it is the opinion of the Special Master that the Feltre in directing her own course to the left actually passed over

from her right side of the channel and *into the Luckenbach's side of the channel.* Manifestly, this invasion of the Luckenbach's side of the channel was an infraction of said 'Inland Rule'. Vide:

Screw Collier v. Webster, L.R. (1910) App. Cas. 165

The Florence, 186 F. 57 at 62".

(b) The statement in the majority opinion that a watchman and an oiler in the "Feltre's" engine room "had *ample* time to *go from the engine room to the deck*" (R. 1424), finds partial support in the statement in the Commissioner's report that the men had ample time "to *escape* from the engine room", but is refuted by the testimony of the two witnesses.

Federico Giraldi testified as follows (R. 957-8):

"A. And then at the same moment, immediately after he put the engine to Stop, there was this crash and the water flooded the engine room.

Q. Do you know anything more about the collision than that?

A. No, all I know, that *we ran away as fast as we could, because in a few seconds the engine room was all filled with water.*"

Aniello Balzano testified as follows (R. 958-9):

"A. I had just come out of the tunnel on my usual tour of inspection of the shaft when the crash came, and immediately after this mass of water came into the engine room I went over to the throttle where the mechanic and the Second Engineer was standing, and then after that I got out just as quickly as I could.

Q. Do you know anything about the collision besides that?

A. Well, I only know that when the water was in the engine room we remained in the dark and *in a few seconds the water had reached up, oh, to our head, and I got out the best I could.*"

It will be seen that the testimony of neither witness supports the statement in the majority opinion that the men had "ample time in which to go from the engine room to the deck after the crash occurred" (R. 1424).

(c) In the majority opinion it is stated that "it may well be that the wreckage did not drop into the water until the vessels separated" (R. 1424). This surmise was answered by the undisputed evidence that the vessels came together "at a sharp angle" and did not swing together so as to hold any broken wreckage suspended. The majority opinion had previously stated that "the vessels collided at a sharp angle" (R. 1419), which statement agrees with the Commissioner's report (R. 213), and with the findings of the District Court (R. 292). There is no basis in the record for the suggestion that the wreckage did not drop into the water immediately.

11. THE MAJORITY OPINION SHOWS THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE TO ESTABLISH THE ALLEGED VIOLATION BY THE "EDWARD LUCKENBACH" OF THE "NARROW CHANNEL" RULE AS REQUIRED BY THE DECISIONS OF THIS COURT.

The majority opinion states:

"In any event it is *fairly clear* that when the vessels collided the Luckenbach was being navigated too close to mid-channel to permit of a safe margin of

passing, and this despite the obvious fact that the channel was of ample width to allow ships to pass without at all crowding each other. No other vessels were in the vicinity to complicate the situation." (R. 1424)

The foregoing excerpt shows that the majority of the court, who had previously stated that the precise point of collision was "*unclear*", without support from the record, now states that "In any event it is *fairly clear*" that at the *time of collision* the "Edward Luckenbach" was too close to mid-channel.

The location of the "Feltre", as shown on the chart inserted in the majority opinion (R. 1418) and in this brief, shows, however, that the "Feltre" had ample room to pass (300 feet at least) if she had continued down the upper range and had not changed her course to the left in violation of the Rules of the Road.

12. THE TESTIMONY OF THE "DOWN-RIVER" WITNESSES REGARDING THE ALLEGED POSITION OF THE "EDWARD LUCKENBACH" IN THE BEND OF THE RIVER, BELOW THE LOCATION OF THE COLLISION, WAS IMMATERIAL, AS THAT TESTIMONY HAD NO RELATION TO THE COLLISION.

The majority opinion states as follows:

"A chief dispute concerns the position of the Luckenbach at the time she passed between the fixed green light and the flashing red buoy *near the bend* of the river. The channel at this point from light to light is about 1000 feet wide. Pilot McNelly, Captain Murphy, and others on board the Luckenbach say she passed close to the red buoy, estimating the

distance to be 100 to 150 feet. Pilot Turppa and another witness aboard the Feltre testified that the Luckenbach passed much closer to the green light on the Washington side than to the red light opposite. Disinterested witnesses aboard vessels coming upstream in the rear of the Luckenbach corroborate the Feltre. Captain Stayton, a Columbia pilot who was navigating a vessel upstream *about a mile and a half astern* of the Luckenbach, testified that at the time the latter passed between the red blinker and the green light he could see that she was nearer the green light. He estimated her place in the channel as about one-third of the distance from the green light and about two-thirds from the red light. The pilot and a watchman on a river tug bound upstream *some distance below the vessel navigated by Captain Stayton,* both say that the Luckenbach passed much closer to the green light than to the red blinker. If this testimony be true—and we see no persuasive reason for discarding the statements of these disinterested and competent witnesses—it places the Luckenbach well to the Washington side of the channel *at the time of her passage between these lights.*" (R. 1424-25)

The evidence that was under consideration related to the position of the "Edward Luckenbach" *when opposite the red buoy in the bend of the river, downstream from the collision,* before the vessels had exchanged one-blast passing signals. This point is clearly apparent from the foregoing excerpt and from the testimony referred to, and is further shown by the chart (R. 1418). Whether the testimony of the "down-river" witnesses should be accepted, as stated in the majority opinion, or should be disregarded, as the senior Circuit Judge concluded after

a detailed review of the testimony, it stands undisputed, and the record shows clearly, that the testimony related solely to the alleged position of the "Edward Luckenbach" at the time she rounded the red buoy *down in the bend* below the locality of the collision. The majority opinion refers specifically to the testimony as fixing the vessel's position "at the time of her passage between these lights" (R. 1425).

In the dissenting opinion it is stated (R. 1443):

> "The course traversed by the Luckenbach up to the time the two vessels sighted one another one and one-half miles distant is entirely immaterial."

13. THE MAJORITY OF THE COURT STATED THAT THE CONWAY CHART (CONWAY EX. 1, R. 1335), WHICH WAS SHOWN BY THE DISSENTING OPINION TO BE UTTERLY WORTHLESS, WAS NOT APPRAISED BY THE COURT AND WAS GIVEN LITTLE CONSIDERATION IN EVALUATING THE TESTIMONY; BUT THE MAJORITY OPINION SHOWS, NEVERTHELESS, THAT THE CONWAY CHART WAS USED TO LOCATE THE "EDWARD LUCKENBACH" ON THE WRONG SIDE OF THE CHANNEL.

The majority opinion states:

> "The course (approximately 155.5°) which she thereafter steered for a space of about 4 minutes continued to carry her obliquely toward the line of the Upper Cottonwood Range and on the wrong side of the channel. At 1:38 A.M. her compass course changed to 176° and at 1:39 it was 188.5°. At 1:40, almost at the moment of the collision, her course was 180.5°." (R. 1425)

The evidence on behalf of the "Feltre" that was opposed to the "Luckenbach" testimony regarding the nav-

igation of the "Edward Luckenbach" from the red buoy up to the place of collision, consisted of, first, the testimony of Pilot Turppa and the other "Feltre" witnesses who corroborated Turppa's version, and, second, the testimony of Captain Conway, an expert who plotted a theoretical course of the "Edward Luckenbach" from her gyro compass record, without allowance for corrections due to tide, wind, current, etc. (Conway Ex. 1; R. 1335).

If Turppa's testimony and Conway's testimony are both to be disregarded, as the majority opinion shows, there was nothing left of the case against the "Edward Luckenbach".

The Commissioner's report shows that he adopted the Conway theoretical plot as establishing that the "Edward Luckenbach" steered a course upstream from the red buoy that carried the vessel across the upper range, and that his finding that the "Edward Luckenbach" violated the "narrow channel" rule was based solely on the Conway plot (R. 234, 239).

The foregoing excerpt from the majority opinion shows that the court likewise *adopted the Conway theoretical plot* to place the vessel "on the wrong side of the channel", notwithstanding that the majority of the court stated that it would not undertake to appraise the value of the Conway chart and that the court had given it little consideration (R. 1427).

The compass courses and the times set forth in the foregoing excerpt are the corrected courses and times obtained from the gyro compass record, and the court therefore must have followed the Conway track in order to

locate the vessel on the wrong side of the channel. There was *no other evidence* on which the court could base the foregoing statement in the majority opinion.

This point will be considered further in connection with the statement of the majority of the court regarding the Conway plot.

14. THE INTIMATION IN THE MAJORITY OPINION THAT THE "EDWARD LUCKENBACH" PILOT'S METHOD OF NAVIGATION WAS NEGLIGENT IS REFUTED BY THE RECORD AND BY THE RECOGNIZED AUTHORITY.

The majority opinion states:

> "As she proceeded up the river the Luckenbach had been navigated entirely *by compass.* It is plain that wind, tide and current had all tended to set her toward the Washington shore; and *it is to be gathered* that her pilot failed for a time to realize his position and that he attempted tardily to correct it by a hard turn to the right." (R. 1425-26)

The majority of the court does not specify the evidence from which "it is to be gathered" that the pilot of the "Edward Luckenbach" navigated the vessel as stated in the foregoing excerpt.

The suggestion that there was something erroneous in steering compass courses is refuted by Bowditch's *American Practical Navigator* (1917 Ed.) wherein it is stated (p. 69):

> "The ship should ordinarily *steer exact courses* and follow exact lines as planned from the chart, changing course *at exact points,* and, where the distances are considerable, her position on the line should be checked at frequent intervals, recording the time and

the reading of the patent log. This is desirable, even where it may seem unnecessary for safety; because, *if running by the eye alone* and the ship's exact position be suddenly required, as in a sudden squall, fixing at that particular moment might be impossible.

"The habit of running *exact courses* with precise changes of courses will be found most useful when it is desired to *enter port or pass through inclosed waters during fog by means of the buoys;* here safety demands that the buoys be made successively, to do which requires, if the fog be dense, *very accurate courses* and careful attention to the times, rate of speed, and the set of the current."

The Columbia river pilots who testified on behalf of the "Feltre" also customarily used compass courses (Turppa, R. 1047; Stayton, R. 1138-40).

Furthermore, the statement in the majority opinion, which appears to be a mere surmise, is hardly in agreement with the earlier statement in the opinion that Captain McNelly, the Luckenbach pilot, was "an experienced, licensed Columbia river pilot" (R. 1417).

15. THE MAJORITY OPINION SHOWS CLEARLY THAT THE COURT REJECTED THE "FELTRE" PILOT'S VERSION OF THE COLLISION, AND SHOWS FURTHER THAT THE EVIDENCE AGAINST THE "EDWARD LUCKENBACH" WAS DOUBTFUL.

The majority opinion states:

"Witnesses on board the Feltre testified that very shortly prior to the collision the Luckenbach crossed the Upper Cottonwood Island Range; and the court found this to be true. However, *it may be doubted whether the Luckenbach actually crossed the course*

> *of the Feltre in the manner testified.* It seems *rather more probable* that when Pilot Turppa's view of the range lights was blotted out by the Luckenbach the latter had already commenced her swing to the right; and that as she swung the vessel's advance brought her between the Feltre and the shore lights." (R. 1426)

We wish to emphasize that the majority of the court stated that "*it may be doubted*" whether Captain Turppa's version of the "Luckenbach" navigation was correct, and that "it seems *rather more probable*" that the "Edward Luckenbach" was swinging to the right (as shown by her gyro compass record).

Captain Turppa's testimony was analyzed in detail in the dissenting opinion of Judge Wilbur, who stated that the testimony was contradicted by the automatic compass record of the "Edward Luckenbach" and concluded "that Captain Turppa's account of the accident is so at variance with established facts as to be altogether unreliable" (R. 1452).

The majority opinion continues as follows:

> "*But whatever may be the fact, the record as a whole is persuasive* that the Luckenbach was so far off her proper course as to come between the Feltre and the lights by which the latter was steering, thus leading the *mystified* Turppa to believe that the Luckenbach was pursuing a crossing course and that his only safety lay in turning his own vessel to the left." (R. 1426)

Earlier in the majority opinion (R. 1422), the confusion in Turppa's mind was attributed, in part at least,

to the failure of the "Feltre" to maintain a lookout and to hear the "Edward Luckenbach's" one-blast signal.

That the facts were in doubt in the minds of the majority of the court is clear from the foregoing excerpt from the opinion wherein the court said "But *whatever* may be the fact". Nevertheless, the majority opinion states "the record as a whole is persuasive" that the "Edward Luckenbach" was off her proper course.

We do not believe that this court will agree for a moment that the foregoing statement of the majority of the Circuit Court of Appeals is a sufficient justification for condemning the "Edward Luckenbach", in view of the law, as settled by the decisions of this court, that evidence against the "Edward Luckenbach" is required to be *clear and convincing and that any reasonable doubt should be resolved in her favor.*

16. **THE FAILURE OF THE MAJORITY OF THE COURT TO APPRAISE THE VALUE OF THE CONWAY CHART CONFIRMS THE CONCLUSION IN THE DISSENTING OPINION THAT THE CONWAY CHART SHOULD BE ENTIRELY DISREGARDED AND THAT IT WAS UTTERLY WORTHLESS.**

The majority opinion states:

> "The Luckenbach was equipped with a Sperry gyroscope compass. Connected to the compass was an auxiliary course recorder which automatically made a record of the courses steered and the corresponding times. An interpretation of the gyro record made by the Sperry Company shows the various courses steered by the Luckenbach for each minute during the time. On the basis of this data, and on the assumption that the collision occurred where the

Feltre sank in the river, a Captain Conway undertook to reconstruct the Luckenbach's course from the time she left the Longview bridge until the collision. Conway's chart, *if accepted as accurate,* tends strongly to confirm the Feltre's side of the case.

"The reconstructed course is a theoretical one and *no allowance was made by Conway for the influence of wind, tide and current,* or for the vessel's advance in turning. Counsel for the Luckenbach argue that, in addition to these infirmities, the evidence afforded by Conway's chart is patently inaccurate in other respects. *We will not undertake to appraise the value of the charted course,* and *we have given it little consideration* in evaluating the testimony. The theoretical showing was admissible for what it might be worth. Whatever its worth it is corroborative of the testimony of eye witnesses and of the circumstances to which we have called attention. *We do not believe that the master or the trial court gave excessive weight to this showing.*" (R. 1426-27)

The record shows, as we have pointed out heretofore, that the Commissioner based his finding against the "Edward Luckenbach" on the alleged violation of the "narrow channel" rule, *solely* on the Conway chart (R. 234, 239, Conway Ex. 1, R. 1335).

The majority of the court also used the Conway chart, as the opinion shows, to establish that the "Edward Luckenbach" crossed the upper range (R. 1425). There was no other evidence to which the court could refer.

Now, however, the majority of the court replies to petitioner's objections to the Conway chart by stating that the court "will not undertake to appraise the value of

the charted course", and that the court has "given it little consideration in evaluating the testimony" (R. 1427).

The majority opinion states further its belief that the master or the trial court did not give excessive weight to this showing (R. 1427). The record, however, shows that the court was mistaken in its belief, as the Commissioner based his finding that the "Edward Luckenbach" crossed the upper range *solely on the Conway chart* (R. 234, 239).

In the dissenting opinion (R. 1441-3) Judge Wilbur did not hesitate to appraise the value of the Conway chart, and showed by a critical examination of the evidence that the chart "should be entirely disregarded" (R. 1441) and that it was "utterly worthless" (R. 1442).

Obviously, a conclusion that is based upon an actual study of the relevant evidence and which is supported by cogent reasons, is entitled to infinitely more weight than a conclusion in which the court states that *it would not undertake to appraise the value of the evidence* and that the same had been given *little consideration* by the court.

17. THE MAJORITY AND MINORITY OPINIONS AGREE THAT THE "FELTRE" TESTIMONY AGAINST THE "EDWARD LUCKENBACH" SHOULD BE REJECTED.

A comparison of the majority and the dissenting opinions shows that they are in agreement upon two important points, namely:

1. Turppa's version of the facts of the collision was erroneous.

2. No consideration should be given to the Conway plot.

The majority of the court, however, erroneously concluded that "the record as a whole" justified an affirmance of the decree against the "Edward Luckenbach", while the dissenting opinion correctly stated that there was *no clear or convincing evidence* of fault against the vessel.

That the dissenting opinion was clearly correct is shown by the authorities to which we will now refer.

VI. AUTHORITIES.

1. **IN VIEW OF THE CLEAR FAULT OF THE "FELTRE", ESTABLISHED BY UNCONTRADICTED TESTIMONY, AND SUFFICIENT TO ACCOUNT FOR THE COLLISION, THE EVIDENCE TO ESTABLISH FAULT AGAINST THE "EDWARD LUCKENBACH" WAS REQUIRED TO BE CLEAR AND CONVINCING, AND SHE WAS ENTITLED TO HAVE ALL REASONABLE DOUBT RESOLVED IN HER FAVOR.**

The City of New York, 147 U.S. 72, 85;

The Ludvig Holberg, 157 U.S. 60, 71;

The Oregon, 158 U.S. 186, 197;

The Umbria, 166 U.S. 404, 409;

The Victory & The Plymothian, 168 U.S. 410, 423;

Marshall Field & Co. vs. United States, (C.C.A. 2) 48 F. 2d 763, 766;

La Flandre, (C.C.A. 3) 9 F. 2d 331, 333;

The Haven Belle, (C.C.A. 4) 85 F. 2d 939, 941;

Otto Marmet Coal & Mining Co. vs. Fieger-Austin Dredging Co., (C.C.A. 6) 259 F. 435, 442;

The Eagle, (C.C.A. 9) 289 F. 661, 663;

Yamashita Kisen Kabushiki Kaisha vs. McCormick Intercoastal S. S. Co. (C.C.A. 9) 20 F. 2d 25, 27.

In *The City of New York,* (supra) this court said:

> "Where fault on the part of one vessel is established by *uncontradicted testimony,* and such fault is, of itself, *sufficient to account for the disaster,* it is not enough for such vessel to raise a *doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and *any reasonable doubt* with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In *The Victory and the Plymothian* (supra) this court said:

> "As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be *clear and convincing* in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

The foregoing authorities show that the "major and minor fault rule" as stated in the leading case of *The City of New York,* (supra) is definitely established as the controlling rule in cases in which the fault of one vessel is clearly established by uncontradicted testimony.

The failure of the District Court to apply this established rule in favor of the "Edward Luckenbach" was assigned as error by petitioner (R. 305, 306) and the question, therefore, was squarely before the appellate court.

In the dissenting opinion, Judge Wilbur cites the decisions of this court in support of his conclusion that the "Edward Luckenbach" should be exonerated (R. 1440).

The majority opinion, however, does not even refer to the rule, nor to the fact that the "Feltre" faults were established by uncontradicted testimony, and contains nothing that indicates that the rule was given any consideration whatever in weighing the case against the "Edward Luckenbach".

In fact, the majority opinion indicates the contrary, as the court stated generally that the evidence was "in sharp conflict", which was an obvious error so far as the testimony against the "Feltre" was concerned.

2. **AN ADMIRALTY APPEAL IS A TRIAL *DE NOVO* AND REQUIRES AN EXAMINATION BY THE APPELLATE COURT OF THE ENTIRE BODY OF THE EVIDENCE IN ORDER TO ARRIVE AT AN INDEPENDENT JUDGMENT.**

In *Watts, Watts & Company, Limited v. Unione Austriaca*, 248 U.S. 9, this court said (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler v. Eaton*, 141 U.S. 240; *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506.
>
> * * * * * * *
>
> In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton v. United States*, 5 Cranch 281; *Irvine v. The Hesper*, 122 U.S. 256, 266; *Reid v. American Express Co.*, 241 U.S. 544."

This quotation was cited with approval by this court in the more recent case of *Langnes v. Green*, 282 U.S. 531, 537.

The subject of trials *de novo* on appeals of admiralty causes was reviewed at length in *Munson S.S. Line v. Miramar S.S. Co.* (C.C.A. 2) 167 F. 960, wherein the Circuit Court of Appeals for the Second Circuit concluded that an appeal vacated the decree of the district court and that the appellate court might revise the decree of the lower court in matters of fact or law, even in favor of a party who had not appealed.

The opinion in the *Munson S.S. Line* case has been cited with approval by this court in several decisions.

Reid v. American Express Co., 241 U.S. 544, 548;
Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146, 155;
Langnes v. Green, 282 U.S. 531, 536.

The function of the appellate courts on trials *de novo* in admiralty was also the subject of an extended review by Judge Denman of the Ninth Circuit in the case of *The Ernest H. Meyer*, (C.C.A. 9) 84 F. 2d 496, wherein the court said (pp. 500-1):

> "It is difficult to believe that, after our broad power in new trials in admiralty appeals recognized by the Supreme Court in 1932 in Brooklyn Eastern Dist. Terminal v. U.S., supra, that Court, without even mentioning in the McCrea Case that it is considering any change in the new trial as effected by Rule 46½, there intended to hold that new trials had been abolished and that we should consider the case as if brought here by writ of error. Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in The Andrea F. Luckenbach (C.C.A.) 78 F. (2d) 827, 828, as follows: 'The well-established rule

is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence.'

"In so weighing the evidence it is not weighed with the end in view of determining whether *a part of the evidence* warrants an inference supporting the finding. We must weigh *the whole evidence*. We so understand the recent opinion in The Mauretania (C.C.A. 2) 80 F. (2d) 225, 228, when he speaks of our going 'at large into the evidence' to determine the correctness of the findings and of the value of the District Judge's decision as 'the *aid* to be derived from his consideration of the facts and the law.' Cf. The Mabel (C.C.A. 9) 61 F. (2d) 537, 540.

* * * * * * *

"It is obvious that, where the testimony is in part in deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses, there cannot be a balancing of credibility between the two. In such a case, and where all or substantially all of the evidence pertinent to the finding is given by deposition, the presumption is of lesser weight and more easily may be rebutted. The Natal (C.C.A. 9) 14 F. (2d) 382, 384: 'The rule that findings of fact are entitled to great weight in an appellate court is modified where, as here, they are based wholly upon depositions.' U.S. v. Los Angeles Soap Co. et al. (C.C.A. 9) 83 F. (2d) 875, decided May 14, 1936.

"In this case the evidence of all the officers and crews of both vessels, testifying to their control of their respective movements toward the collision, is by deposition. The presumption supporting the findings below, therefore, has the slight weight described in The Natal, supra."

From the foregoing authorities it is clear that in the instant case the majority of the Circuit Court of Appeals failed to determine the appeal of petitioner according to the principles that govern in a trial *de novo.*

Instead of weighing the *whole evidence* in the light of the presumptions in favor of the "Edward Luckenbach" that resulted from the clear fault of the "Feltre", the majority opinion shows that the court erroneously proceeded on the theory that the entire evidence was "in sharp conflict" and therefore the findings of the District Court should not be disturbed.

On *one point only* with respect to the navigation of the "Edward Luckenbach" (the alleged violation of the "narrow channel" rule) was the evidence reviewed even superficially in the majority opinion, and on that issue the majority of the court failed to give to the "Edward Luckenbach" the benefit of the doubt to which the vessel was clearly entitled under the rule in *The City of New York,* (supra). The remaining claims of alleged fault were passed over with the statement that "Whether each vessel was guilty of all of the faults attributed to it we need not inquire" (R. 1421).

With respect to the Conway plot on which, alone, the Commissioner based his finding that the "Edward Luckenbach" violated the "narrow channel" rule (the only alleged fault of that vessel considered in the majority opinion), the court said:

> "We will not undertake to appraise the value of the charted course, and we have given it little consideration in evaluating the testimony." (R. 1427)

VII. CONCLUSION.

A careful review of the whole body of the evidence, as required on a trial *de novo*, should have convinced the majority of the court that:

(a) The faults of the "Feltre" were clearly established by uncontradicted testimony and sufficient to account for the collision.

(b) On the issue of the alleged violation of the "narrow channel" rule there was no clear and convincing evidence to establish fault on the part of the "Edward Luckenbach".

(c) There was no evidence whatever to sustain the other alleged faults found against the "Edward Luckenbach".

The foregoing conclusions clearly appear from our analysis of the majority opinion, and show that this is a proper case for the review of the majority decision by this court.

More convincing, however, than any argument that we can present, is the able dissenting opinion of the senior circuit judge, which is appended hereto, and to which petitioner refers in support of its petition for a writ of certiorari.

San Francisco, California,
June 8, 1942.

Respectfully submitted,

LYMAN HENRY,
Merchants Exchange Building,
San Francisco, California,
Counsel for Petitioner.

FREDERICK W. DORR,
Merchants Exchange Building,
San Francisco, California,
Of Counsel.

(APPENDIX FOLLOWS)